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FISCAL IMPACT REPORT

SPONSOR <u>HJC</u>	ORIGINALDATE <u>1/24/08</u>	LAST UPDATED <u>2/12/08</u>	HB <u>309/HJCS/aHAFC</u>
SHORT TITLE <u>State Ethics Commission Act</u>			SB _____
		ANALYST	<u>Wilson/Baca/ Hanika-Ortiz</u>

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY08	FY09		
	\$500.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB 344, SB 320 and SJR 6

SOURCES OF INFORMATION

LFC Files

Responses Received From*

Attorney General's Office (AGO)
Public Education Department (PED)
Secretary of State (SOS)

*(Analysis for original bill used as appropriate.)

SUMMARY

Synopsis of HAFC Amendment

The House Appropriations and Finance Committee Amendment replaces the term “providing” with the term “allowing” relating to ethics training and the publication of ethics guides in the title of the act; adds language that provides for penalties in the title of the act; includes a “state employee” to the list of positions a commissioner may not hold during the commissioner’s service; provides that a commissioner shall also not hold or seek public employment for one year after their term; provides that the commission may compile, adopt, publish and provide ethics guides and offer annual ethics training, but it will no longer be required under powers and duties; provides that an executive director may hire a general counsel, but it will no longer be required under duties; provides that anyone disclosing confidential complaints or files to be guilty of a misdemeanor, and grants penalties; allows the court to also impose civil penalties; and, reduces the amount of appropriation to \$250 thousand (from \$500 thousand).

Synopsis of Original Bill

House Judiciary Committee Substitute for House Bill 309 provides clarifying language and appropriates \$500,000 from the general fund to the State Ethics Commission for expenditure in fiscal year 2009 to carry out the provisions of the State Ethics Commission Act.

The HJC substitute for HB 309 establishes the state ethics commission act and creates a ten member state ethics commission (SEC) as an adjunct agency. The bill defines the membership, terms, powers and duties of the commission. The SEC is required to receive and investigate complaints against state officers, state employees, government contractors and lobbyists alleging ethics violations, report its findings and maintain public records as required pursuant to the act. The SEC will also be required to publish an ethics guide to clearly and plainly explain ethics requirements in state laws and a business ethics guide relating to conducting business with the State. The SEC must provide annual ethics training to all state officials, state employees, government contractors and lobbyists. In addition, the SEC will be required to promulgate rules necessary to implement and administer the act. The SEC is also given the authority to subpoena information and witnesses needed to conduct investigations, recommend disciplinary action for ethics violations, issue advisory opinions and resolve complaints through stipulation or consent order.

Provisions in the bill allow the SEC to appoint an executive director, and provides for the duties of the director. The director is tasked with hiring a general counsel for the SEC and all other personnel required to enable the commission to carry out its responsibilities.

FISCAL IMPLICATIONS

The appropriation of \$500,000 contained in this bill is a recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of fiscal year 2008 shall revert to the general fund.

The bill provides that members of the SEC are entitled to receive per diem and mileage reimbursement but will not receive any other form of compensation. The legislation does not specify an approved level of staff for the agency, but allows for an executive director, a general counsel and all other personnel as may be necessary to carry out the responsibilities of the commission. Until the staffing requirements of the agency are determined and the agency will begin operation, it is difficult to assess whether this appropriation level will be sufficient to adequately fund the agency and commission operations.

SIGNIFICANT ISSUES

CS/HB 309 differs from the original in that CS/HB 309:

- Deletes the definition of campaign contribution and political purpose;
- Adds state employees to the list of those who may not serve on the commission;
- Calls for the development of a code of ethics for members of the executive branch;
- Requires commission to report findings to the appropriate legislative committee;
- May request the Attorney General issue subpoenas instead of the commission with the Attorney General being responsible for enforcement of non-compliance;
- Establishes a three year statute of limitations period;

- Requires that the commission notify a respondent not later than five days after finding “no probable cause” to the complaint being investigated and include findings of fact and conclusions, and
- Clarifies that a respondent and his/her legal counsel may attend and participate in a commission’s hearing.

The effective date of sections 1 through 5, 8 and 11 through 13 of this act is July 1, 2008. These sections provide the authority for the SEC to be formed, hire staff and begin to implement the provisions of the act.

The effective date of sections 6, 7, 9, and 10 of this act is January 1, 2009. These sections are titled:

6. COMMISSION ADVISORY OPINIONS;
7. COMMISSION-COMPLAINTS-INVESTIGATIONS-FINDINGS AND RECOMMENDATIONS...
9. CRIMINAL VIOLATIONS – REFERRALS REQUIRED
10. COMPLAINTS AND INVESTIGATIONS – TIME LIMITATIONS

The establishment of a SEC is a Governor's initiative. The legislation is a result of recommendations of a task force on ethic reform set up by the governor in its report submitted on October 4, 2006. The task force was established to study the issues of governmental ethics and campaign finance reform in an attempt to improve ethical behavior in state government. The task force recommended establishing an independent SEC to promote increased accountability for ethical behavior among State officials and employees, lobbyists and those that conduct business with the state. In the 2007 legislative session this will was introduced, but failed to pass.

CS/HB 309 establishes the SEC as an adjunct agency, which is defined in Section 9-1-6 NMSA 1978 as an agency that is excluded from direct or administrative attachment to a department, and which retains policy making and administrative autonomy separate from any other instrumentality of state government. The task force found that the commission's political, administrative and legal independence will be of critical importance to the effective functioning and administration of the SEC.

The AGO notes that 40 other states have established independent ethics commissions s to review ethics issues. It can be strongly argued that the most important function of such a commission will be education and training to help change the culture of government and awareness of ethical issues.

ADMINISTRATIVE IMPLICATIONS

The DFA claims that the creation of the SEC as an adjunct agency to maintain the independence of the agency from any direct or administrative attachment to a department may have negative administrative ramifications for the agency. Although the agency is given the authority to hire staff as necessary to carry out its responsibilities, with an appropriation of \$500,000 that must cover operating costs, publications of ethics manuals, training for all State officials, State employees, government contracts and lobbyists, as well as mileage and per diem for commission members, the agency will be limited in its staff size. This level of appropriation will probably only support an estimated 3 to 4 staff positions, of which one will be an executive director and the other a general counsel. As has been the experience with other small agencies, administrative

staff will probably be minimal and may serve multiple functions. This may present a problem for the agency to have an adequate level of expertise over policy and programmatic issues as well as administrative functions. In order for the agency to remain independent, these functions could not be supplemented by support from any existing agency.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

CS/HB 309 is similar but does not duplicate HB 344, State Ethics Commission Act

CS/HB 309 relates to SB 320, Ethical Conduct of Political Subdivisions and SJR 6, Create State Ethics Commission, CA

TECHNICAL ISSUES

The PED* noted the following in its response to the original but the comments are considered applicable to the committee substitute:

Page 10, Lines 6-8 (22 – 24), is a mammoth undertaking; it requires the Commission to provide annual ethics training to all those within its jurisdiction. That would include all state employees, all legislators, all government contractors and all lobbyists. Unless individuals must pay for this training, this will be a significant cost as well as a logistical challenge. Whatever the nature of the training given by the Commission, this will create a legal standard of care for those who are trained.

Page 15, lines 18 – 25 and page 16, Lines 1-2, address the interview of witnesses and the right of respondents to be represented by attorneys. Because the Commission will most likely be confronted with respondents who could claim the right against compelled testimony and self incrimination (5th Amendment to the US Constitution), this will invoke consideration of what the Commission will do when a person, who could face criminal proceedings, refuses to cooperate or to testify.

Section 12 of the Act prohibits retaliation against someone who files a complaint or provides testimony or documents pursuant to the Act. Although the section notes that “nothing in the State Ethics Commission Act precludes civil actions or criminal sanctions for libel, slander or other civil or criminal claims against a person who files a false claim under that act,” the prohibitory language does not provide any consequences under the Act if retaliation occurs. That could make this provision “directory” as opposed to “mandatory”. A directive is not commonly considered mandatory where it is not essential to statutory intent.

*Page numbers and lines have been changed to correspond with the appropriate page numbers and lines in the committee substitute.

DW/mt